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THE REMEDY BY *CERTIORARI* IN THE STATE OF NEW YORK FOR ILLEGAL, ERRONEOUS OR UNEQUAL ASSESSMENTS.[1]

THE subject of this paper relates only to assessments of real and personal property for local taxation, and does not embrace assessments of real property for local improvements.

The remedy furnished by the writ of *certiorari* was adopted in this State by the Supreme Court early in its history, and was modeled largely if not entirely from the writ as administered in England under the common law. The writ, both in England and in this State, at first only brought into question the jurisdiction of the lower court or tribunal, and did not present to the upper Court any question of law or fact upon the merits of the case. In New York State, during the early part of the Nineteenth Century, the common law writ was the only means of reviewing decisions of tax assessors, although by various acts of the Legislature the writ of *certiorari* was extended or applied to many proceedings of a criminal or quasi-criminal nature.

Until about the year 1840 the decisions appear to have been fairly consistent in applying the old rule that a *certiorari* could not review anything but the jurisdiction of the lower court or tribunal; but about this year doubt began

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to be entertained in the minds of the Judges whether questions of law upon the merits might not also be considered by the courts. Accordingly, as time went on, by small degrees a departure was made from the old English rule by some of the Judges, although others in turn refused to enlarge the functions of the writ. This conflict became so apparent about the year 1865, that Morgan, J., in the case of Baldwin *v.* The City of Buffalo,[1] said that the decisions of the courts in relation to the office of a common law *certiorari* were so conflicting that it was quite impossible to say that any settled rule had ever been established in this State from which the courts had not subsequently departed. The opinion in that case, however, laid it down as established by the decisions of the Court of Appeals, that a writ of *certiorari* would bring up so much of the evidence as was necessary to present the questions of law upon which the relator relied to avoid the determination of the inferior tribunal. Following this decision, there were a number of cases in the Court of Appeals which substantially settled the law to be, that the writ would take up questions of law as well as the jurisdiction of the lower tribunal, but that questions of fact could not be considered.

This continued to be the state of affairs throughout the State (exclusive of the City of New York) until Chap. 269 of the Laws of 1880 was passed, which provided for a *certiorari* to be issued by the Supreme Court upon the petition of a person assessed, which might allege that the assessment was illegal, or erroneous by reason of over-valuation, or was unequal by reason of the fact that the assessment had been made at a higher proportionate valuation than other real or personal property had been assessed on the same assessment roll by the same officers. Sec. 1 of this act provided specifically what must be shown in order to obtain the writ and under what conditions it could be granted. This act is preserved at the present day as Sec. 250 of the Tax Law of 1896 (Chap. 908 of the laws of that year). Under this act assessments outside of the City of New York, for both real and personal property, may be reviewed for (1) illegality, including jurisdictional questions, (2) for over-valuation, both as matter of law and as matter of fact,

[1] 35 N. Y., 380.

and also (3) for inequality which may be alleged as a reason for reduction or cancellation of the assessment.

There is, however, one feature of the proceedings by *certiorari* under this Act of 1880, which, previous to the passage of that statute, was wholly unknown. The writ of *certiorari*, in its original function gave essentially merely a right of review. Previous to the Act of 1880 the only function of the writ was to give a right of appeal from the inferior tribunal. The Act of 1880, however, provides that if, upon the hearing, it shall appear to the Court that testimony is necessary for the proper disposition of the matter, the Court may take evidence, or may appoint a referee to take such evidence as the Court may direct, and such testimony shall constitute a part of the proceedings upon which the determination of the Court shall be made. The effect of this provision in the statute has been held in the case of People *ex rel.* Manhattan Railway Company *v.* Barker,[1] to bring about the result that in cases where the testimony is taken, the writ operates as a *venire de novo*, and, really, brings about a new trial of the same questions that were submitted to the inferior tribunal. Both at common law and under the Code, the return to the writ is conclusive. Not so in the case of the *certiorari* taken out under the Act of 1880. The petition is regarded in the nature of a complaint, and the writ and the return to the writ as an answer. An issue thus being joined, and testimony taken at Special Term, the issues are retried, and the Court proceeds to the determination anew of the precise questions that had previously been disposed of by the assessing officers. There is still some debatable ground with respect to the right of the relator to insist upon the introduction of testimony at Special Term and upon the hearing. The better view, however, seems to be that where there is an issue of fact joined by the petition and the return, and where the cause is not to be disposed of merely on questions of law, the relator has a positive right to insist upon putting in further testimony at the hearing, and to obtain a new trial of the issues of fact. It is obvious that such issues of fact would most generally arise in cases of overvaluation or inequality of valuation, or non-residence.

[1] 152 N. Y., 417.

In regard to the City of New York the legislation has not been so simple. In the year 1857, by Chapter 677 of the acts of that year, Section 24, it was provided that in the City of New York a *certiorari* to review and correct *upon the merits* any decision or action of the Commissioners of Taxes would be allowed by the Supreme Court or by any Judge of that Court, directed to the Commissioners upon the petition of the party aggrieved, and should with the return be heard and decision rendered by the Court in preference to other matters. Subsequently, in the year 1859, a further revision of the tax laws as regards the City of New York was made, and Section 24 of the Act of 1857 was re-enacted as Section 20 of Chapter 302 of the Act of 1859. Under this act the evidence was considered by the Court and the question of over-valuation was deemed to be taken up by the writ.

In the year 1882 an act,[1] was passed to consolidate all existing legislation in regard to the City of New York, and the act of 1859 was re-enacted in such act as Section 821. In 1885 the Legislature, evidently fearing that the general tax act of 1880 might be deemed to apply to the City of New York, passed an amendment to Section 821 of the Consolidation Act, by which the writ of *certiorari* in New York City was confined to questions of illegality and over-valuation, and the Supreme Court was precluded from exercising by this writ the power to review assessments which were unequal, or made at an excessive rate of valuation as compared with that adopted for other property on the same assessment roll.

This legislation being deemed unjust to the City of New York in granting to the assessors great powers for oppression and favoritism, a strong effort was made upon the enactment of the Charter for Greater New York to change the rule, and accordingly when that Charter was passed[2] the Act of 1880 was closely adhered to, and by Section 906 real estate assessments were allowed to be questioned by writ of *certiorari* on the ground of inequality, although the right to attack assessments on personal property on this ground was withheld.

[1] Chap. 410.

[2] Laws of 1897, Chap. 378.

The only statutory difference now existing between the right of a taxpayer to pursue a remedy by *certiorari* outside of the City of New York and within its limits consists in the rule that in New York City assessments upon personal property may not be questioned by reason of any alleged inequality between the particular assessment complained of and other assessments for personal property upon the same assessment roll, nor can assessments of personal property be contrasted with those of real estate.

The decisions affecting the writ of *certiorari* as applicable to cases of inequality of assessment have been hardly homogeneous and it is somewhat difficult to extract from the mass of authorities what is the true rule. In looking the cases over a great distinction is at once apparent between the remedy for inequality in New York City and that for inequality elsewhere. Outside of the greater city the proceeding is governed by the Act of 1880, and it has been held in one decision[1] that the petition for the writ need not state in detail wherein the inequality existed, but that it might allege that the assessment was unequal in the language of the statute and that the petition was in the nature of a pleading, and conclusions of facts were alone required to be stated and not the facts themselves.

Somewhat later, in the case of People *ex rel.* New York Central and Hudson River Railroad Company *v.* Budlong,[2] it was decided that when relief was sought on the ground that the valuation placed upon the relator's property was higher than that placed on the property of various other persons or corporations in the town, instances of such inequality should be stated, but in that case it was held that where a petition alleged that the relator's property was assessed at 95 per cent. of its value and all other property at 50 per cent. of its value, the petition was sufficient without going further into details and specifying any instances wherein such valuation was adhered to. Later cases outside of New York City[3] seem to have followed this rule and problems such as confront the assessors and taxpayers in the greater City of New York are avoided elsewhere.

[1] Matter of Nesbit, 3 App. Div.

[2] 25 App. Div., 373.

[3] People *ex rel.* Erie R. R. Co. *v.* Webster, 49 App. Div., 506.

In New York City, complications arise in applying the remedy of *certiorari* to cases of inequality in that the Greater New York Charter, which first permitted this remedy, required instances of the inequality to be set forth in the petition. The question immediately arose whether every instance of such inequality should be stated or whether one or two were sufficient.

It was contended by counsel in the case of the People *ex rel.* People's Trust Company *v.* Feitner,[1] that the Charter was not supreme, but it was held that as the Charter was passed in 1897 and the General Tax Law in 1896, the Charter as the later expression of the legislative will should control in every case where the provisions of the two acts were in conflict. In that case also the Charter provision that inequality might only be raised in New York City with respect to real estate assessments was applied, and the relator who sought to review the assessment upon mortgage bonds on the ground that the assessment on such bonds was higher than upon real estate generally was held not entitled to the writ.

Approaching now more closely the difficulties which it was intimated existed in New York City in applying the remedy as regards inequality, we find that in the case of People *ex rel.* Bronx Gas Light Company *v.* Feitner,[2] the Appellate Division, First Department, decided that where inequality was sufficiently alleged in the petition for the writ and a sufficient number of instances of it were alleged, the Court at Special Term was obliged, upon application of the relator, either to order a reference to take the testimony with regard to the allegations of the petition or to hear it itself. It was decided that Section 253 of the Tax Law, which provides that testimony may be taken if it is necessary for the proper disposition of the matter, was really not permissive, but mandatory, and that the Court had no discretion, but upon due demand by the relator, showing a *prima facie* case, was compelled to order that testimony be had. In that case, however, the petition was regular and complied with the charter provisions in stating a number of instances of inequality. It does not appear

[1] 51 App. Div., 176.
[2] 43 App. Div., 198.

from the opinion in the case, however, whether all these grounds and facts contained in the petition for the writ were or were not presented before the Commissioners.

In the later case of People *ex rel.* Sutphen *v.* Feitner[1] the relator owned property on Riverside Drive whose assessment had been largely increased in the year 1898, and he accordingly applied to the Commissioners for a reduction of the assessment, alleging that the assessment was larger than the assessed value of adjacent property in accordance with the market value of the same. The petition, however, stated no instance of inequality, but simply alleged that the assessment upon the relator's property had been raised from what it had been previously, and contained the general averment that it was greater than the property adjacent. The Commissioners re-assessed the property, and upon the further report of the deputy assessor ordered the assessment to stand. At the Special Term, when the relator moved for judgment upon the papers, the motion was denied. The relator then moved that further testimony be taken to support his allegations. This the Court denied on the ground that further testimony was not necessary. The Appellate Division said that although the rule of the Bronx case that Section 253 of the Tax Law must be considered as mandatory and not as permissive was applicable upon the facts of that case, yet that where no facts were presented before the Commissioners and the petition for the writ contained no allegations of instances of inequality and merely stated general conclusions, the courts should not be burdened with the entire duty of taking evidence upon the issue of inequality, and that it was never intended that the entire burden of reviewing assessments should be placed upon the courts and not upon the assessors. It was accordingly held that Section 253 of the Tax Law would not be construed as mandatory, except in cases where facts had been presented before the Commissioners and in the petition for the writ.

Considering this case and the Bronx case together, the true rule seems to be that in cases where the relator desires to have evidence taken by the court or by a referee to be appointed by the Court, the Court must make such

[1] 45 App. Div., 542.

an order where the relator has complied with the charter requirements and stated instances of inequality, but that where he has neglected to state such instances he will not be assisted by the courts in ordering a reference or taking testimony. A still later case[1] fully confirms this statement of the rule. This doctrine would seem to put upon a relator the burden of extreme care from the very start of the proceeding; but it has been held in a number of cases that at any time the relator may apply to the court to be allowed to amend his petition, and the courts have frequently in the decided cases stated that such amendments are within the discretion of the court and might be allowed at any time before final determination of the issues presented by the writ and return.

In a recent case decided by Judge Andrews,[2] these problems are presented, and it is suggested that it must shortly be decided, whether the Greater New York Charter can be construed to have totally changed the rule laid down by the Court of Appeals as to the remedy furnished a taxpayer by the Act of 1880.

Considering the writ of *certiorari*, as applied to questions of over-valuation of property by assessing officers, it is only necessary to show in the petition for the writ that the property has been assessed at a sum in excess of an amount at which, under ordinary circumstances, it would sell; and it is not necessary that these very words be used, but any language that is equivalent may be employed. In the case of People *ex rel.* Broadway Improvement Company *v.* Barker,[3] the relator stated that the property was assessed at $210,000 more than its market value, and it was held that this was sufficient compliance with the provisions of the statute, as it was equivalent to stating that the property was assessed $210,000 more than the sum it would bring at a sale.

Where the assessment is illegal, either from want of jurisdiction of the assessors or for other causes, the writ of *certiorari* is the proper remedy, although in cases where

[1] People *ex rel.* The Broadway Realty Company *v.* Feitner, decided by the Appellate Division, First Department, in April, 1901.

[2] People *ex rel.* Marlborough Hotel Company *v.* Feitner, 33 Misc., 293.

[3] 14 App. Div., 412.

there is absolute want of jurisdiction in the assessors, either because of non-residence or other cause, a mandamus can also be employed.

The decisions in the Appellate Division have threshed out these principles quite fully, and the Court of Appeals, in a recent case, has refused to interfere with the discretion of the Appellate Division in refusing a mandamus; so the law upon this subject can practically be deemed settled. One of the most important of these authorities is the case of People *ex rel.* Powder Company *v.* Feitner,[1] where the corporation had its office in Tarrytown, Westchester County, but was assessed in New York City for the year 1898. On July 18th a petition for a writ of *certiorari* was presented to the court, and it was alleged that the assessors had no jurisdiction and that the assessment was illegal. It was objected that *certiorari* was not the proper remedy, but the court held that under Section 250 of the Tax Law the writ could be employed to review assessments void for want of jurisdiction, as well as any other illegal assessments, and when assessors acted without jurisdiction their action was illegal within the meaning of this section of the Tax Law.

In People *ex rel.* Cochran *v.* Feitner[2], the Court had a state of facts almost the converse of those considered in the Powder Company case, and it was there held that where an assessment for personalty was made against the executors, administrators and trustees of the estate of H. P. DeGraff, a mandamus could not be employed to strike the assessment off the roll; that the assessment was illegal in form, but that as long as the assessors had jurisdiction over the property, the writ of *certiorari* was the only remedy, and that mandamus would not lie. The Court in considering the question stated that either the Tax Law or the Code *certiorari* might be employed at the option of the relator, as the assessment was illegal and could have been remedied by the writ at the common law. A somewhat similar question arose in the case of the People *ex rel.* N. Y. Cent. & Hudson River R. R. Co. *v.* Feitner[3], where the local

[1] 41 App. Div., 544.
[2] 44 App. Div., 239.
[3] 55 App. Div., 544.

tax commissioners assessed the relator for real estate, and included the tunnel property from 42d street to the City limits. This had already been assessed, under the provisions of the Special Franchise Tax Act, by the State Board, and under that act local tax commissioners were forbidden to tax property that had already been taxed by the State Board. Mandamus proceedings having been brought to cancel this assessment, the Court refused to remove the assessment from the rolls. It was held that the relator's proper remedy was *certiorari* and that mandamus would not lie. Upon a mandamus the Court had only the right to strike off the entire assessment or permit it to stand, and upon the writ of *certiorari* correctionary powers were granted to the Court as well as the power to strike out the assessment. The Court said that the tax commissioners had general jurisdiction over the property, and therefore the remedies were not concurrent, and that mandamus could not be used. This case was carried to the Court of Appeals,[1] where the appeal was dismissed, the Court refusing to review the discretion of the Appellate Division in dismissing the writ of mandamus. These cases support the conclusion that mandamus is a proper remedy only in a case of total want of jurisdiction on the part of assessors, and that even then it is a concurrent remedy only, and that *certiorari* can also be used. *Certiorari* is, as the courts declare, a proper remedy in all cases to review tax assessments.

Let us now consider somewhat in detail the cases which have regulated the procedure in applying for and obtaining the writ.

A number of cases have arisen in the last three or four years in this State as to who can apply for a writ of *certiorari*, and who is entitled to verify the petition, and it has been held that in a proper case the petition for the writ may be verified upon information and belief,[2] and that a tax agent of a large railroad was qualified to sign and verify the petition on behalf of the company.[3]

In making application for writs of *certiorari* it has been

[1] 166 N. Y., 154.

[2] People *ex rel.* West Shore R. R. Co. *v.* Johnson, 29 App. Div., 75.

[3] People *ex rel.* Erie R. R. Co. *v.* Webster, 49 App. Div., 556.

decided that the writ must be addressed to the entire Board of Assessors, and not to the individual members or to a majority of them by name.[1] A relator who addressed his writ in this fashion was held to have committed an error in practice, and he was directed by the Appellate Division to apply to the Special Term for leave to amend his writ.

Another interesting point as to parties to the petition arose in the case of the People *ex rel.* Washington Building Co. *v.* Feitner.[2] In that case twenty-two relators joined in the same petition for a writ, alleging that they had each been assessed too high for their respective pieces of real estate. The parcels of real estate owned by the separate relators were not contiguous, although in the same general neighborhood. It was held that Section 250 of the Tax Law did not contemplate uniting of taxpayers to question assessments unless they complained of the assessments for the same reason and upon the same or identical facts; and the Court considered the situations of the various pieces of property and concluded that obviously different reasons would apply to the assessment of each of the different parcels, and, therefore, superseded the writ. In the Court of Appeals this point was affirmed by a majority of the Court, holding substantially that only persons might join in a petition for a writ whose interests were largely identical, but a strong dissenting opinion was written, concurred in by Landon, O'Brien and Martin, Justices, who considered that the statute was intended to allow two or more persons to share the expense, where conditions were substantially alike, and that the remedy should be construed liberally by the courts, to avoid oppression and favoritism. However much we sympathize with the dissenting opinion in this case, the law stands that practical identity of interest is necessary for two or more property owners to join in the same petition for a writ.

With regard to the time within which the petition for the writ must be filed, more decisions have been rendered than on almost any other part of the practice connected with this remedy.

In approaching this question, we find a difference in the

[1] People *ex rel.* Benedict *v.* Roe, 25 App. Div., 107.

[2] 30 Misc., 247; 163 N. Y., 384.

authorities between New York State in general and New York City. In New York State generally the Tax Law governs and the writ must be taken out within fifteen days after the filing of the assessment roll with the town clerk. Cases have arisen as to when the writ shall be deemed filed and in what cases a relator may be excused from a literal compliance with the statute. In People *ex rel.* Cornell Steamboat Company *v.* Hornbeck.[1] the relator appeared before the Tax Commissioners on the 3d Tuesday in August, and they reduced the assessment, completed the tax roll, verified and filed it upon that day, as required by Section 35 of the Tax Law. The statute states that a copy of the roll must be left with one of the assessors, where it may be seen and examined by any person until the 3d Tuesday in August, the date on which these assessors took action. The relator did not seek by petition to obtain the writ within fifteen days from the third Tuesday in August, but if the word "until" could be construed as excluding the third Tuesday and requiring the assessors to keep the writ until the next day—Wednesday—the writ would have been in time. It was held, however, that the word "until" meant that that day was to be excluded from the time the assessors were required to keep the books, and that their action in completing and filing the rolls on that day was perfectly regular; that they were not required to wait until the next day, and that the relator's writ, not being in time, should be dismissed. In People *ex rel.* N. Y. Central & Hudson River R.R. Co. *v.* Sheppard,[2] a motion was made to quash a writ of *certiorari* on the ground that it had not been taken up within the fifteen days. On August 22d—the last day to file the assessment roll—it was left with the mail at the town clerk's office. His wife, in his absence, took it in and as it was wrapped up in a paper, the package did not reach the town clerk's hands until the 24th, when he marked it filed as of that day. The relator's writ was taken out within fifteen days from the 24th, and it was held that it was in time, as the roll was not left originally with the clerk with the clear and unmistakable purpose of having it filed upon that day, so that the

[1] 30 Misc., 212.
[2] 33 Misc., 453.

real filing day must be considered to be the 24th. Although the courts have construed this time provision quite strictly, yet in Matter of Stow,[1] the relator was held excused for not applying for the writ within the fifteen days, by reason of the fact that no Special Term sat at that time, and the writ applied for and obtained at the earliest Special Term after the rolls were completed was held to have been properly granted.

In New York City these cases we have considered do not apply, as formerly under the Consolidation Act and now under the Charter, the assessments become final on the first day of May, and the petition for the writ may be presented within four months from the time they are final, as authorized by Section 2125 of the Code, or may be taken out within fifteen days from the time the assessment rolls, called "Books of the Annual Record," are filed with the Municipal Assembly on the first day of July. In People *ex rel.* Bronx Gas Light Company *v.* Barker,[2] a *certiorari* was obtained on June 29th, and it was construed to have been properly obtained, on the ground that the assessment became final on May 1st, and that after that time the Commissioners could only hear complaints which had been made before May 1st, and that a writ taken out within four months from May 1st was perfectly valid. This decision was followed by a number of other cases, and in People *ex rel.* Brewing Company *v.* Feitner,[3] the rule of the Bronx case was applied, and a petition for a writ presented on November 1st was considered too late, not being within the four months mentioned in Section 2125 of the Code.

Another requisite to obtain a writ is that, except in a case of want of jurisdiction, it should be stated that proof has been offered before the Tax Commissioners. The cases we have considered upon the question of inequality, the Bronx Gas Light Company case and the Sutphen case, largely decide the questions that have been raised as to this point. In People *ex rel.* Speir *v.* The Tax Commissioners[4] the writ was dismissed upon the ground that when the

[1] 25 Misc., 580.
[2] 22 App. Div., 161.
[3] 41 App. Div., 496.
[4] 28 Misc., 591.

Consolidation Act took effect a person who desired to obtain a reduction of assessments by *certiorari* was required to do more than make a statement of claim before the Commissioners that all personal property was exempt. The examination upon oath of the applicant was made necessary by Section 820 of the Consolidation Act, and by Section 36 of the Tax Law, a statement must be filed with the assessors, under oath, specifying the respect in which the assessment complained of is incorrect. It seems that in that case the relator had filed a statement showing that his personal property (excluding all bank shares) which was subject to taxation, did not exceed six thousand dollars. The relator had included in his statement both property of his own and certain property as executor, belonging to an estate which had been willed to the City of New York for a free fountain. It was held that this general statement by the relator to the Commissioners about both his own property and the property represented by the legacy was not sufficient; that a specific claim for the exemption for the property devised to the city should have been made before the Tax Commissioners.

Not only must a statement be made before the Commissioners, but the relator must himself appear before them to be examined under oath respecting his statements, or appear by an attorney capable of presenting proof as to relator's claim for reduction or vacation of the assessment. In People *ex rel.* Brown *v.* O'Rourke,[1] the relator was assessed as an executor of an estate, and put in an affidavit that the estate, with one exception, consisted of shares of corporations that were already taxed. The assessors were dissatisfied with the affidavit and called upon relator to appear; but he had gone West, and his agent responded to their call, but the agent knew nothing of the facts. It was held that the affidavit could be disregarded by the assessors, and that their refusal to reduce the assessment was justified, on the ground of non-appearance of the relator. The Court, in holding this doctrine, assumed that the relator would have been entitled to a reduction of his assessments if the facts stated in his affidavit had been true and had been testified to by him in person.

[1] 31 App. Div., 583.

A curious point that has presented itself in reviewing assessments complained of in the City of New York is: Where should the writ of *certiorari* be made returnable if the person or corporation resides outside of the Borough of Manhattan? This question was considered in the case of The Matter of Tilyou,[1] and in People *ex rel.* Long Island R. R. Co. *v.* Feitner,[2] and the rule reducible from those decisions is that in case of a corporation outside of Manhattan Borough the writ should be made returnable in New York County, as final determinations in cases of corporations are made by the Commissioners in New York County by the Charter; but that in cases of individuals the writ should be made returnable in the Borough in which the taxpayer resides. In cases of individuals the figures are kept in the Borough Tax Offices and the assessments made by the deputies in the different boroughs. All assessments in cases of persons and corporations in New York City are considered as made tentatively on the second Monday in January, and up to that time the main tax office has nothing to do with the assessments of individuals, although it has with the assessments of corporations. These cases clearly set forth the proper doctrine upon this point.

The question remains to be considered as to what is the effect of an assessment upon non-residents, how the question may be raised, and if the assessors persist in making such an assessment, are they entitled to collect the tax by using personal remedies? It has always been held that the tax assessors have no jurisdiction to impose a tax for personal property upon non-residents, and that their action (if they persist in placing such a tax upon the rolls) is an illegal act which can be remedied by a common law writ of *certiorari* or by a writ of mandamus, or the non-resident may consider the tax a nullity, and if it should be collected, sue to recover it back. All these propositions are so well settled that they have not been raised among the recent cases. In the case of City of New York *v.* McLean,[3] the defendant was a citizen of the State of New Jersey, who had never lived in New York, but he owned shares of stock

[1] 57 App. Div., 101.
[2] 53 App. Div., 181.
[3] 57 App. Div., 601.

in the Standard National Bank, and was assessed in respect to those shares by the tax commissioners in New York City. For some reason the bank did not pay the assessment against those shares, and several years after the assessment was levied, action was brought by the City of New York against McLean to recover the amount of the tax. The sole question that arose was as to whether the defendant could be deemed personally liable on account of his being a non-resident. It was held, that in so far as residents were concerned, the Legislature had not only the power to tax their personal property without regard to domicile, but also had the power to subject such residents to a personal liability with respect to that tax as well as to any other tax. It was held that a foreign corporation, owning stocks in national banks in New York City, was required to appear before the assessors precisely as a resident, if he wished to raise the question that the assessors had erroneously overvalued stock, but the Court stated that it had never been decided in this State that a non-resident individual could be held personally liable for the tax. The Court considered with care a number of decisions of the United States Supreme Court bearing upon the question, and adduced the rule that although the State has the power to levy a tax upon personal property of a non-resident, situated within its boundaries and subject to its jurisdiction (and for that purpose could separate the situs of the owner from the actual situs of the property within the State and subject it to taxation because it was within the State), yet it could only enforce payment of the tax by virtue of its jurisdiction over the property and that it had not by virtue of that jurisdiction any power to subject the owner of it to a personal liability for the tax. From this decision Van Brunt and O'Brien, J. J., dissented on the ground that it was against public policy to permit such taxes to be evaded, as they would never be collectible from non-residents if the doctrine of the majority of the court was to prevail; because the certificates of the shares were in a sense negotiable instruments and could easily be transferred to other parties, so that the personal liability alone could be resorted to.

A curious question might arise in the event that a citizen

was assessed in his place of residence for a piece of real estate situated outside of the assessing district. It might be argued that the tax could not be enforced against the citizen by personal remedies in the event that he failed to get the assessment set aside by *certiorari*. Under the *dictum* in the case of the City of New York *v.* McLean,[1] there would seem to be no question of the right of the State to collect the tax from the individual taxpayer, as it is within the State's power to provide for the collection by personal remedy of all taxes assessed against its citizens. As the assessors of the district where the citizen resided would have no jurisdiction to assess him for the real estate, their acts would be void, and a sale of the real estate under proceedings taken to collect the tax would probably not give good title. However, this case could hardly arise in practice, as no doubt all assessors would know the boundaries of their assessing districts, and it would hardly be assumed that they would attempt in the face of the Tax Law to assess a resident of their district for lands which they knew to be outside of their jurisdiction.

We have thus followed the development of the writ of *certiorari* through the decisions, and have noticed the important points in the practice that has grown up within recent years upon this comparatively novel form of remedy—for we must remember that it is only since the year 1880 that the writ has assumed such wide functions and been used to correct the ordinary errors made by tax assessors. In many instances it would seem that the Tax Law, outside of New York City, was simpler and more logical, both in its theory and practice, than the modifications of the remedy that the Charter has brought forth; but it can be safely said on the whole that most of the disputed territory regarding this writ has either been covered or been entered into, and that there are now few pits into which the practitioner need fall, if he has consulted the body of decisions upon this remedy.

JULIEN T. DAVIES.

[1] 57 App. Div., 601.